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17 Attorneys for Plaintiffs

18 UNITED STATES DISTRICT COURT
19 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

20 MICHAEL LAVIGNE, *et al.*,
21 Plaintiffs,
22 vs.
23 HERBALIFE LTD., *et al.*,
24 Defendants.

CASE NO. 2:18-cv-07480-JAK (MRWx)
[Related Case 2:13-cv-02488-BRO-RZ]

**PLANTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF *EX PARTE*
APPLICATION TO MODIFY
SCHEDULING ORDER**

*[Filed concurrently with [Proposed]
Order]*

Assigned to Hon. John A. Kronstadt,
Courtroom 10B

I. INTRODUCTION

On August 31, 2020, the Court held a Post Mediation Status Conference to discuss next steps in this matter. The Court extended all outstanding deadlines in the case based “on the anticipated issuance of rulings on Defendant’s Motion to Dismiss (ECF No. 208) and Plaintiffs’ Motion for Class Certification (ECF No. 207) (collectively the “Pending Motions”) by November 2, 2020.” ECF No. 282. At the August 31, 2020 hearing the Court noted that the extension of all deadlines was intended to avoid the expenditure of resources before ruling on the Pending Motions. The Court has not yet ruled on the Pending Motions, necessitating the extension of pretrial deadlines.

The parties are in agreement that the current scheduling order needs to be modified but disagree about which deadlines should be extended. Defendant exclusively seeks extension of non-discovery deadlines, while Plaintiff requests that any modification include all upcoming deadlines (including those for Expert Disclosures).

Several factors necessitate this extension; most importantly is the pendency of the Pending Motions. The pleadings are not yet closed (Defendant has yet to answer) and the size and scope of any potential class has yet to be defined by the Court. Moreover, discovery is not yet complete in this matter as Defendant is still in the process of producing outstanding documents. Accordingly, *ex parte* relief is necessary.

This case is about Defendant Herbalife International of America (“Herbalife”) conspiring with a cadre of individuals who act together, using misrepresentation and deceit, to sell tickets to a series of live events. The events are pitched as the guaranteed pathway to life changing financial success with the multi-level marketing business opportunity sold by Defendant. During the relevant period, Defendant sold hundreds of thousands of tickets to the prospective class members at a cost ranging from \$40 to \$175. Declaration of Yaniv Adar (“Adar Decl.”), ¶ 3-4. The highly detailed First

1 Amended Complaint (ECF No. 202), alleges that Herbalife conducts the affairs of a
2 racketeering enterprise, conspires to conduct the affairs of a racketeering enterprise,
3 violates California's Unfair Competition Law, and negligently misrepresents the
4 correlation between event attendance and financial success. Defendant's moved to
5 dismiss the First Amended Complaint (ECF No. 208) and Plaintiffs have moved to
6 certify a class based on the allegations contained within the First Amended Complaint
7 (ECF No. 207). On February 24, 2020, the Court heard oral argument on the Pending
8 Motions. Two days later, the Court entered the following Order:

9 The Motions are taken UNDER SUBMISSION. Counsel should
10 meet and confer, and file a joint report on or before 3/5/2020, with
11 their respective and/or collective views as to what dates should be
12 adopted for future pre-trial proceedings in this matter following
13 the issuance of the orders on both the Defendant's Motion and
14 Plaintiffs Motion.

15 On March 5, 2020, the Parties issued a joint report urging the Court to hold all
16 outstanding deadlines in abeyance pending ruling on the two outstanding motions
17 (ECF No. 262). On April 22, 2020, the Court entered an order extending all deadlines
18 by approximately four months (ECF No. 266).

19 On June 16, 2020, Plaintiffs filed an *ex parte* application to extend all pre-trial
20 deadlines pending resolution of the Pending Motions (ECF No. 275). Defendant
21 opposed, asking the Court to extend only non-discovery related deadlines (ECF No.
22 276). The Court extended all pre-trial deadlines the following week (ECF No. 277).

23 On August 24, 2020, Plaintiffs reached out to Defendant's counsel to extend
24 all pre-trial deadlines again pending resolution of the Pending Motions. Adar Decl. at
25 ¶ 5. Defendant's counsel promptly responded, "in light of Judge Kronstadt's ruling
26 on plaintiffs' prior application, we will not oppose this application." *Id.* at ¶ 6. The
27 following week, the Court set these deadlines "based on the anticipated issuance of
28 rulings on the Pending Motions by November 2, 2020":

1 January 11, 2021 Initial Expert Disclosures
2 January 25, 2021 Rebuttal Expert Disclosures
3 February 8, 2021 Expert Discovery Cut-Off
4 February 15, 2021 Last day to file All Motions (*including discovery Motions*)
5 ECF No. 282.

6 Because the anticipated ruling date has come and gone and in light of the
7 upcoming holidays, Plaintiff's counsel reached out to Defendants' counsel proposing
8 a 90-day extension of all deadlines. Adar Decl. at ¶ 7. Despite previously
9 acknowledging the Court's refusal to only extend some deadlines (as opposed to all
10 remaining deadlines), Defendants reverted to their June 2020 position that only
11 extensions of non-discovery deadlines are appropriate. *Id.* at ¶ 8. Even though
12 Defendant previously recognized that expert disclosures should not occur until after
13 the Court's ruling on the Pending Motions, *see* ECF Nos. 262, 282, Defendant's
14 counsel indicated that he was unable to agree to that relief. This *ex parte* motion
15 followed.

16 Plaintiffs have not been idle since oral argument on the Pending Motions. In
17 addition to attempting to confer with Defendant on certain discovery issues, Plaintiffs
18 have obtained discovery from six critical non-party witnesses: Leslie Stanford, Susan
19 Peterson, Enrique Carillo, John Tartol, Garrain Jones, and Cody Morrow (the
20 "Testifying Producers"). The Testifying Producers possessed key information and
21 documents directly relevant to Plaintiffs' allegations. Despite agreeing to produce
22 documents and provide deposition dates in January, the Testifying Producers waited
23 another three months to begin producing documents and failed to offer even a single
24 deposition date until June 12, 2020. *Id.* at ¶¶ 9-13. After belatedly producing over
25 300,000 pages, the Testifying Producers agreed to sit for deposition on select dates
26 through August 2020. *Id.* The parties also have pending matters before Magistrate
27 Judge Wilner that remain unresolved. *See, e.g.* ECF No. 300.

28 Plaintiffs' request for a modified scheduling order should be granted for three

1 reasons:

2 First, the pleadings are not yet closed. The Court has yet to rule on Defendant's
3 Motion to Dismiss. Defendant has not pled its affirmative defenses and it would be
4 unfair to compel Plaintiffs to disclose expert reports without the benefit of first
5 considering those defenses.

6 Second, the size and scope of any potential class has yet to be defined by the
7 Court. It is unreasonable to require Plaintiffs to advance expert testimony — including
8 damages testimony completely contingent on class definition — before any class has
9 been defined by the Court. Because a ruling on Plaintiffs' Motion for Class
10 Certification is imminent, from a practical standpoint it makes sense to postpone the
11 deadline to exchange expert reports and engage in expert discovery until after the
12 parties have the benefit of a ruling on that motion.

13 Third, Plaintiffs have not been provided an opportunity to finalize the discovery
14 they need to bring this case to a conclusion — either at trial or on summary judgment.
15 Plaintiffs have diligently litigated this case from its inception. To date, the parties
16 have exchanged hundreds of thousands of pages of documents, served written
17 discovery and have participated in seventeen depositions. At this rate, its fact
18 investigation stage will be complete after the expert disclosure deadline and after the
19 dispositive motion deadline, but before any affirmative defenses are lodged.¹ This
20 sequencing is prejudicial to the Plaintiffs who will not be able to test the sufficiency
21 of Herbalife's defenses in fact discovery.

22 By this motion, Plaintiffs respectfully submit that the deadlines be reset so as
23 to mitigate this prejudice.

24 **II. LEGAL ANALYSIS**

25 *Ex parte* relief is appropriate where the moving party seeks relief that cannot
26

27 ¹ Plaintiffs have reserved the right to seek the completion of Herbalife's corporate
28 representative deposition and seek additional discovery pending receipt of the answer
and affirmative defenses.

1 be addressed by a regularly-noticed motion, and will face prejudice if its application
2 is denied, provided that the party is without fault in creating the need for *ex parte*
3 relief. *See Mission Power Engineering Co. v. Continental Cas. Co.*, 883 F. Supp. 488,
4 492 (C.D. Cal. 1995). As explained below, *ex parte* relief is appropriate because
5 Plaintiffs have diligently litigated the case; because denial of *ex parte* relief would
6 prevent Plaintiffs from obtaining critical discovery necessary to its efforts to prepare
7 its initial expert disclosures and motions for summary judgment through no fault of
8 their own; and because Defendant will not be prejudiced by the relief sought. In fact,
9 the parties all agree that the deadlines should be extended, but the Defendant wishes
10 the deadlines to be extended in a manner that maximizes the prejudice to the Plaintiffs
11 rather than allowing the orderly administration of this matter.

12 In determining whether to modify the current scheduling order, the Court
13 should consider (i) the degree of prejudice to any party; (ii) the ability of that party to
14 cure the prejudice; (iii) any impact which the amendment would have on the orderly
15 and efficient conduct of the trial; and (iv) any willfulness or bad faith by the party
16 seeking the amendment. *Newegg Inc. v. Ezra Sutton, P.A.*, CV1501395TJHJCX, 2016
17 WL 9108891, at *1 (C.D. Cal. Aug. 19, 2016) (citing *Galdamez v. Potter*, 415 F.3d
18 1015, 1020 (9th Cir. 2005). *Unihan Corp. v. Max Group Corp.*, CV 09-07921 MMM
19 PLAX, 2011 WL 6814044, at *1 (C.D. Cal. Dec. 28, 2011) (same). Each of these
20 factors weigh in favor of a modification here.

21 **a. Plaintiffs will be prejudiced if *ex parte* relief is not granted.**

22 Due to the unique procedural posture here and the scope of the allegations
23 made, Plaintiffs would be prejudiced absent a continuance of pending deadlines
24 including the deadline to serve initial expert disclosures (January 11, 2021) and the
25 last day to file motions (including dispositive and discovery motions, February 15,
26 2021). There are three reasons why Plaintiffs will be prejudiced if the scheduling
27 order is not modified: (1) the pleadings are not yet closed in this matter; (2) the size
28

1 and scope of the class has yet to be defined by the Court; and (3) Plaintiffs have been
2 denied access to critical discovery through no fault of their own. For each of these
3 reasons the scheduling order should be modified.

4 1. The pleadings are not yet closed in this matter.

5 If the Court completely denies Defendant's Motion to Dismiss and grants
6 Plaintiffs' Motion for Class Certification in its entirety, Defendant will still need to
7 plead their affirmative defenses. It is unfair and impractical to expect Plaintiffs to
8 proceed with expert disclosures before having the benefit of complete pleadings.
9 Similarly, Plaintiffs will not have the opportunity to move for summary judgment on
10 any of Herbalife's defenses under the current schedule.

11 The case of *Dinwiddie v. United States*, 1:18-CV-00197-DCN, 2020 WL
12 86193, at *2 (D. Idaho Jan. 7, 2020), is instructive. In that case, the United States (a
13 defendant in a civil matter) sought leave to add additional, previously unpled
14 affirmative defenses. *Id.* at *1. The Plaintiff then sought an extension of the expert
15 disclosure deadline, but the United States refused contending Plaintiff "was aware of
16 its intent to provide evidence of [the unpled affirmative defenses] because it stated as
17 such in a response to interrogatories." *Id.* In rejecting the United States' argument and
18 granting Diwiddie's request to extend the expert disclosure deadline, the *Dinwiddie*
19 court held:

20 The Court rejects the United States' argument that Julie failed to
21 diligently pursue this discovery because she had adequate notice of this
22 defense via the February 5, 2019, response to interrogatories. The
23 language in the response that purportedly puts Julie on notice simply
24 states, "the transfer was fraudulent under the laws of the State of
25 Alaska." Dkt. 31-1, at 8. Even if it can be said that this language is
26 legally sufficient to alert Julia of the United States' intent to utilize the
27 fraudulent transfer affirmative defense, that language was contained in
28

1 a response to an interrogatory, not in an answer to a complaint. As such,
2 it cannot qualify as an affirmative defense. *See* Fed. R. Civ. Pro. 8(c)
3 (“In responding to a pleading, a party must affirmatively state any
4 avoidance or affirmative defense.”). A response to an interrogatory
5 does not carry the same significance that an affirmative defense does.
6 The United States must have known this, which is why on August 1,
7 2019, it filed an Amended Answer and included the new affirmative
8 defense.

9 *Id.* at *2.

10 Plaintiffs are not seeking a significant extension of pretrial deadlines. Rather,
11 Plaintiffs are requesting what they anticipate will be the minimum extension
12 necessary to properly prepare experts for this complex case after having the benefit
13 of seeing Defendant’s answer and affirmative defenses. It would be prejudicial to
14 deny Plaintiffs the opportunity to engage in discovery in response to Defendant’s
15 affirmative defenses. *See, e.g., Gold v. Midland Credit Mgt., Inc.*,
16 13CV02019BLFMEJ, 2014 WL 3371429, at *3 (N.D. Cal. July 9, 2014) (discussing
17 Plaintiffs right to seek discovery on affirmative defenses); *New York v. Micron Tech.*,
18 *Inc.*, C 06-6436 PJH, 2009 WL 29883, at *6 (N.D. Cal. Jan. 5, 2009) (same).

19 2. The size and scope of the putative class has not been defined by the
20 Court.

21 Additionally, it does not make sense for the parties to rush to proceed with their
22 expert disclosures when the size and scope of any potential class is going to be defined
23 by the Court imminently. The Court’s ruling on the Pending Motions will undoubtedly
24 have an effect on Plaintiffs’ expert disclosures. While Plaintiffs can submit expert
25 disclosures based on the current allegations of the Amended Complaint and can
26 speculate as to the most likely ruling on class certification, it would be highly
27 inefficient — and prejudicial — for Plaintiffs to do so. It is difficult to imagine a
28

1 scenario where the Plaintiffs submit their expert disclosures four weeks from now,
2 and then are not compelled to renew those disclosures in light of the Court's rulings
3 and Defendant's affirmative defenses.

4 3. Plaintiffs have been denied access to critical discovery through no
5 fault of their own.

6 The parties have exchanged hundreds of thousands of pages of documents,
7 served written discovery, spent dozens of hours conferring on the proper scope of
8 discovery, participated in seventeen depositions, and served dozens of subpoenas on
9 critical third-party witnesses. As evidenced by their October 31, 2019, *ex parte*
10 application to extend pretrial discovery deadlines (ECF No. 199), Defendant and
11 Testifying Producers spent the bulk of last year refusing to produce any documents
12 and have unfairly and improperly delayed Plaintiffs access to discovery in this matter.

13
14 **b. The orderly administration of this case and trial**

15 As the schedule currently stands, expert disclosures are due prior to the filing
16 of affirmative defenses. The schedule also likely requires the parties to prepare expert
17 reports before the Court rules on Defendant's Motion to Dismiss or Plaintiffs' Motion
18 for Class Certification (or, at best, within days of those rulings be issued). Granting
19 this *ex parte* motion will result in the orderly and efficient administration of this case
20 without effecting the trial date in this matter (as this matter is not yet on the Court's
21 trial docket).

22 **c. Plaintiffs' good-faith pursuit of discovery**

23 Upon transfer of this case to this district, Plaintiffs promptly propounded
24 discovery. *See* Adar Decl., ¶ 14. To date, the Plaintiffs have propounded requests for
25 production on November 14, 2018, August 23, 2019, and November 22, 2019, a
26 request for inspection on October 17, 2019, and interrogatories on June 12, 2019,
27 August 9, 2019, and November 22, 2019. *Id.* at ¶ 15. Moreover, Plaintiffs have
28 participated in seventeen depositions, have propounded dozens of third-party

1 subpoenas *duces tecum*, and are still awaiting documents pending a ruling from
2 Magistrate Judge Wilner. *Id.* at ¶ 16.

3 Simply, the requested relief is due entirely to factors outside of Plaintiffs’
4 control. Plaintiffs’ efforts have been diligent, consistent, and have clearly established
5 good cause for the relief sought herein. *John v. Mammoth Recreations, Inc.*, 975 F.2d
6 604, 609 (9th Cir. 1992) (“[G]ood cause means scheduling deadlines cannot be met
7 despite [a] party’s diligence”).

8 **III. PLAINTIFFS’ NOTIFIED DEFENDANTS OF THIS APPLICATION**

9 Plaintiffs gave notice to Defendants of this application, as required by Local
10 Rule 7-19. Defendants’ counsel’s, name, address, telephone number, and e-mails re
11 as follows:

12 Paul Chan, Mark T. Dooks, and Gopi K. Panchapakesan

13 Bird, Marella, Boxer, Wolpert, Nessim, Dooks, Lincenberg & Rhow, P.C.

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19 Plaintiffs’ counsel conferred with Defendants’ counsel regarding the relief
20 sought herein. The parties were ultimately unable to agree on the relief sought. Thus,
21 this application became necessary.

22 **IV. PROPOSED MODIFIED SCHEDULING ORDER**

23 As required by the Court’s August 31, 2020 Order (ECF No. 282), Plaintiffs
24 submit the following amended proposed scheduling order consistent with the Court’s
25 requirements:
26
27
28

1 2 3 4 5 6 7 8 9 10 11	[January 11, 2021] April 12, 2021	Initial Expert Disclosures
	[January 25, 2021] April 26, 2021	Rebuttal Expert Disclosures
	[February 8, 2021] May 10, 2021	Expert Discovery Cut-Off
	[February 15, 2021] May 17, 2021	Last day to file All Motions (including discovery motions)

V. CONCLUSION

For the foregoing reasons, good cause exists to modify the Court's August 31, 2020 Order (ECF No. 282) to extend all pretrial deadlines as proposed.

DATED: December 10, 2020

Respectfully submitted,

Mark Migdal & Hayden

By: /s/ Yaniv Adar

Yaniv Adar

Attorneys for Plaintiffs Patricia Rodgers,
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